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In the Supreme Court of the United States

OCTOBER TERM, 1974

No.

FEDERAL TRADE COMMISSION, PETITIONER

v.

ADOLPH COORS COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the Federal Trade Commission, petitions for a writ of certiorari to review the portion of the judgment of the United States Court of Appeals for the Tenth Circuit that set aside two paragraphs of the Commission's order.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A)[1] is reported at 497 F. 2d 1178. The decision of the Federal Trade Commission (Pet. App. B) is not yet reported.

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[1]The court of appeals opinion is set forth as Appendix A of the petition for a writ of certiorari in *Adolph Coors Company* v. *Federal Trade Commission*, No. 74-128, seeking review of other aspects of the judgment of the court of appeals. The Federal Trade Commission decision is set forth as Appendix B and the Initial Decision of the Administrative Law Judge as Appendix C of that petition. These opinions are not reproduced herein. "Pet. App." refers to the appendix to the petition in No. 74-128.

JURISDICTION

The judgment of the court of appeals was entered on June 21, 1974. On August 27, 1974, Mr. Justice White extended the time for the Federal Trade Commission to file a petition for a writ of certiorari to October 9, 1974, and on October 1, 1974, he granted a further extension to and including November 18, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

The court of appeals sustained the determination of the Federal Trade Commission that respondent, a brewer, had violated Section 5 of the Federal Trade Commission Act in several aspects of its relationships with the independent distributors of its beer, including its use of the threat of speedy termination of the distributorship agreements to force the distributors into anticompetitive behavior.

The question presented is whether the court of appeals improperly constricted the Commission's remedial authority by setting aside provisions in the Commission's order requiring the brewer to cease and desist from cancelling any distributorship agreement unless it gives the distributor longer notice than it now is obliged to give and the right to arbitrate disputes concerning termination.

STATUTE INVOLVED

Section 5(a) and (c) of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U.S.C. 45(a) and (c), provides in part:

(a)(1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.

* * * * *

(6) The Commission is empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

* * * * *

(c) Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business * * *.

STATEMENT

1. *The administrative proceedings.* On June 7, 1971, the Federal Trade Commission (the "Commission") issued a complaint charging that Adolph Coors Company ("Coors"), a brewer, violated Section 5 of the Federal Trade Commission Act. The complaint alleged that Coors imposed price, territorial and customer restrictions upon the distributors and retailers of its beer.

After extensive hearings, the Administrative Law Judge found that Coors had not violated the Act and dismissed the complaint (Pet. App. C). On appeal by complaint counsel, the Commission vacated the initial decision (Pet. App. B). Substituting its findings for those of

the Law Judge (see Pet. App. B-12), the Commission concluded that Coors had violated the Act and issued a thirteen-paragraph cease and desist order. Paragraphs 1 through 11 (Pet. App. B-2—B-5) prohibit Coors from engaging in specific anticompetitive marketing practices.[2] The Commission found (Pet. App. B-49—B-58) that Coors had used the threat of termination under the short-notice provisions of its distributorship agreements (five days if for cause; 30 days if without cause) to coerce the distributors to engage in anticompetitive conduct (Pet. App. B-49—B-55) and that Coors' "use of these provisions under the circumstances of this case * * * constitute[d] an unfair method of competition" (*id.* at B-55). Paragraphs 12 and 13 of the order prohibited Coors from terminating any distributorship agreement unless it gave the distributor longer notice than it previously had been obliged to give (60 days if for cause; 180 days if without cause) and a right to arbitrate disputes concerning termination (*id.* at B-5—B-7).

In including these provisions governing Coors' termination of its agreements with its 166 independently-owned distributors (Pet. App. A-5),[3] the Commission pointed out that, because the distributorships are not assignable and involve investments of up to $2,000,000 (Pet. App. B-50, n. 20), the threat of cancellation was a highly effective means of obtaining the distributors' acquiescence in Coors' wishes.

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[2]The Commission found, *inter alia*, that Coors had engaged in wholesale and retail price fixing (Pet. App. B-15—B-33), territorial restraints (*id.* at B-33—B-39), coercion of retailers to sell its draught beer exclusively (*id.* at B-39—B-45), and refusals to sell to central warehouse accounts (*id.* at B-45—B-49).

[3]One additional distributor is wholly-owned by Coors (Pet. App A-5).

2. *The court of appeals decision* On petition for review by Coors, the court of appeals affirmed in part and reversed in part (Pet. App. A). After concluding that the Commission's findings were supported by substantial evidence (Pet. App. A-10, A-15—A-16), the court unanimously upheld paragraphs 1 through 11 of the cease and desist order, but, Judge Holloway dissenting, set aside paragraphs 12 and 13 (Pet. App. A-19).

The court stated that the termination provisions in the distributorship contracts are "a matter of private contract and are not subject to interference by third parties" (Pet. App. A-18) and indicated that those provisions could be interfered with only if, standing alone, they violated Section 5 of the Act (*ibid.*). Judge Holloway concluded that paragraphs 12 and 13 should be sustained in view of the termination threats utilized by Coors "to force acquiescence of its distributors in anti-competitive behavior," the Commission's wide discretion "in its choice of remedy deemed adequate to cope with unlawful practices," and cases such as *Atlantic Refining Co.* v. *Federal Trade Commission*, 381 U.S. 357, which have upheld "orders affecting contractual relationships * * * where unlawful practices involved similar subtle pressures and threats of termination of dealers' leases" (Pet. App. A-20).

REASONS FOR GRANTING THE WRIT

This case presents an important question concerning the authority of the Federal Trade Commission to require changes in contract terms when necessary or appropriate to provide effective relief. The holding of the court of appeals that the Commission does not have that authority conflicts with decisions of this Court and other courts of appeals concerning the permissible scope of the Commission's remedial powers. This Court

should review the decision of the court of appeals for the further reason that that court's narrow view of the Commission's powers, if accepted, would substantially limit the Commission's ability to remedy effectively a wide variety of anticompetitive practices.

1. The limited function of a court in reviewing relief ordered by the Commission is to determine whether the Commission exceeded its discretion in selecting an appropriate remedy to eliminate past or future unlawful practices. Since the Commission has wide discretion to devise appropriate remedies, "the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist." *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608, 613. See also *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 473; *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419, 428-430; *Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 392-395.

The court of appeals did not conclude that the limitations on Coors' power to terminate distributors imposed by paragraphs 12 and 13 are not reasonably related to Coors' unlawful practices, and, on this record, it could not properly have so ruled. Indeed, the court sustained (Pet. App. A-17) the Commission's finding that Coors had used express and implied threats of termination to induce anticompetitive behavior by distributors, on the basis of which the Commission had concluded that the termination provisions "have been part and parcel of the aggregation of trade restraints in which respondent has engaged, and must fall with them" (Pet. App. B-55), and that it would not be suffi-

cient to order Coors to refrain from terminating or threatening to terminate distributors who refuse to engage in anticompetitive activities.[4]

Where, as here, the relief ordered bears a reasonable relationship to the violation found, the relief need not be be limited to conduct or matters that themselves would violate the Act. The Commission, like a court remedying an antitrust violation, is empowered to impose prophylactic measures bearing upon activities that might otherwise be lawful. See, *e.g.*, *United States* v. *Loew's, Inc.*, 371 U.S. 38, 53; *Federal Trade Commission* v. *National Lead Co., supra,* 352 U.S. at 430; *United States* v. *Bausch & Lomb Optical Co.*, 321 U.S. 707, 724. Accordingly, the court of appeals erred in holding that the Commission could not interfere with Coors' contract termination provisions because they "do not violate Section 5 of the Federal Trade Commission Act" (Pet. App. A-18).

2. The court of appeals further erred in ruling that paragraphs 12 and 13 were invalid because they dealt with "private contract" obligations that "are not subject to interference by third parties" (Pet. App. A-17-A-18).

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[4]The Commission observed that an order merely prohibiting coercive threats "would be extremely difficult to enforce and would therefore do little to encourage the independent choice by distributors in matters of pricing and customer selection that is necessary to remedy the abuses found in the record" (Pet. App. B-56). As the Commission said, "[s]o long as [Coors] * * * can cut off its distributor 'without cause' there is always some possibility that it will exercise the power, and threaten to exercise the power to anticompetitive ends" (*id.* at B-57). Paragraphs 12 and 13 are reasonably designed to curtail this possibility "while at the same time not unduly hampering Coors' capacity to terminate poorly performing distributors" (*ibid.*).

In *Federal Trade Commission* v. *Motion Picture Advertising Serv. Co.*, 344 U.S. 392, this Court, in a proceeding under Section 5, sustained a Commission order requiring modifications of existing contracts,[5] and other courts of appeals have also upheld such relief. See, *e.g.*, *Luria Bros. & Co.* v. *Federal Trade Commission*, 389 F. 2d 847 (C.A. 3), certiorari denied, 393 U.S. 829; *La Peyre* v. *Federal Trade Commission*, 366 F. 2d 117 (C.A. 5).[6] These decisions apply the general principle noted by this Court in *Simpson* v. *Union Oil Co.*, 377 U.S. 13, 18, that governmental interests "frequently override agreements that private parties make" and that agreements that are lawful as a matter of private contract law "must give way before the federal antitrust policy." Antitrust decrees, for example, frequently require substantial modifications of private contracts. See, *e.g.*, *Besser Mfg. Co.* v. *United States*, 343 U.S. 444, 447; *United States* v. *National Lead Co.*, 332 U.S. 319, 357-358; *United States* v. *Bausch & Lomb Optical Co.*, *supra*, 321 U.S. at 723-724; *United States* v. *United Shoe Mach. Corp.*, 110 F. Supp. 295, 352-353 (D. Mass.), affirmed, 347

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[5]In *Motion Picture Advertising*, the Commission prohibited a distributor of advertising motion pictures from entering into exclusive display contracts for more than one year and "from continuing in effect any exclusive provision of an existing contract longer than a year after the date of service in the Commission's order." *Id.* at 394. This Court said that the Commission did not exceed "the limits of its allowable judgment" in adopting that provision. *Id.* at 396. See also *Atlantic Refining Co.* v. *Federal Trade Commission*, *supra*, 381 U.S. at 361-362, nn. 2,3, 372-376.

[6]In *Luria* the Commission prohibited various companies from purchasing more than 50 per cent of their scrap metal from Luria although existing contracts required them to purchase greater amounts. 389 F. 2d at 863. In *LaPeyre* the Commission imposed limits on rentals for machinery at rates less than those specified in some of the existing leases. 366 F. 2d at 121.

U.S. 521. The power to restrain a violator of the Federal Trade Commission Act from exercising rights it may have under contracts with other private parties is essential if the Commission is to deal effectively with the anticompetitive conduct that may have been used to secure those rights or that may result from their exercise. The court of appeals' denial of such power to the Commission will seriously hinder the Commission in implementing its statutory mandate to prevent unfair acts and practices or methods of competition.[7]

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[7]Resolution of conflicts with respect to the Commission's remedial powers and the scope of judicial review of Commission orders is particularly important because the broad venue provision of the Federal Trade Commission Act, 15 U.S.C. 45 (c), which authorizes review in any circuit where the unfair method, act or practice was used or where the party resides or carries on business, would permit many firms against whom the Commission issues orders to seek review in the court below so as to take advantage of the decision in this case narrowly construing the Commission's authority.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.[8]

Respectfully submitted.

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[8]As we have indicated in our response to Coors' petition for a writ of certiorari (No. 74-128) to review the decision of the court of appeals insofar as it sustained the Commission's decision and order, we do not believe that such review is warranted. Because the question presented by this petition is not related to the questions presented by Coors in its petition, there is no need for the Court to grant certiorari in that case if it grants review in this case.

DOJ-1974-11